

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 VALENTIN TAPIA; ROMULO RICANO
4 BALDERAS; and EUFEMIA
5 CASTILLO,

6 Plaintiffs,

7 v.

14 Civ. 8529 (AJN)

8 BLCH 3RD AVENUE LLC; AJIT
9 BAINS, and SATINDER SHARMA,

10 Defendants.

11 New York, N.Y.
12 December 4, 2015
13 11:00 a.m.

14 Before:

15 HON. ALISON J. NATHAN,

16 District Judge

17 APPEARANCES

18 MICHAEL FAILLACE & ASSOCIATES
19 Attorneys for Plaintiffs
20 BY: RAQUEL A. GUTIERREZ

21 KAUSHIK & ASSOCIATES
22 Attorneys for Defendants
23 BY: NITIN KAUSHIK (by telephone)
24
25

1 (Case called)

2 MS. GUTIERREZ: Raquel Gutierrez on behalf of all
3 plaintiffs. Good morning, your Honor.

4 THE COURT: Good morning, Ms. Gutierrez. We are faced
5 with a situation of no one on behalf of the defendants being
6 present, I'll say at the outset, we won't talk substance.
7 Frankly, I would -- hang on a second. Pause.

8 Mr. Kaushik has called. I am going to put him on the
9 speaker phone.

10 This is Judge Nathan. This is 14 Civ. 8529. Do I
11 understand, Mr. Kaushik, that you are on the line?

12 MR. KAUSHIK: Yes, your Honor.

13 THE COURT: I didn't authorize this for a telephone
14 conference. We are not well set up for it. I am going to ask
15 that you answer my questions when directed to do so and keep
16 your voice up so that the court reporter who is here can take
17 down what you are saying.

18 Also here in the courtroom is Ms. Gutierrez on behalf
19 of the plaintiffs. I was just about to begin the proceeding,
20 which was by order, by court order, scheduled to begin at
21 10:15, and we heard no word from anyone on behalf of the
22 defendant. So I had just taken the bench to inquire of
23 plaintiffs' counsel how they would like to proceed when I
24 learned, Mr. Kaushik, that you were on the phone and so nothing
25 has occurred yet in this conference until now.

1 First, let me ask, Mr. Kaushik, if there was some
2 reason that you did not receive the court order both scheduling
3 and confirming the date and time of this conference.

4 MR. KAUSHIK: No, your Honor. My apology, your Honor.

5 THE COURT: We are having difficulty understanding
6 you. Repeat what you said and if you could keep it succinct
7 and clears for purposes of the court reporter.

8 MR. KAUSHIK: Yes, your Honor. Your Honor, my apology
9 because my voice was a little choppy because I'm calling from
10 India right now and I had requested one of my colleagues
11 appear, but nobody came. That's my fault, your Honor. I'm
12 really trying to partake --

13 THE COURT: We are having difficulty understanding
14 you. I am going to just indicate how I intend to proceed and
15 you can put in writing an explanation for the failure to appear
16 as ordered by this Court.

17 I will say that sometimes things happen, but from what
18 I understand of the record here, there has been a pattern of
19 nonparticipation at some level by the defendants, not total
20 nonparticipation, but late filings, including the ordered
21 pretrial materials. There was a failure, it would seem, to
22 meet and confer with plaintiffs' counsel.

23 But the question in my mind is how to proceed from
24 here and I don't take well, to be honest, Mr. Kaushik, to
25 counsel's failure to participate in the proceedings as ordered

1 and required by the Court. It is not fair to your opposing
2 counsel and her clients who pay for her time. It is not fair
3 to the court, which prepared for this proceeding, the time of
4 the court reporter and the like. You just simply don't get to
5 decide which of the Court's orders regarding scheduling and
6 conferences you participate in and which you don't.

7 Let me be totally clear on that. Moving forward I
8 will permit no excuses at all for failures to appear, failures
9 to abide by court-ordered schedules and the like. You are at
10 risk, as I speak, of sanctions for what has occurred in this
11 case. I'm not imposing sanctions yet, but I'm putting you on
12 clear warning that I believe the pattern of behavior here is
13 troublesome and will no longer be tolerated. As to how to
14 proceed I have pretrial materials that were not prepared
15 jointly. I have a written explanation of that from both sides.
16 I don't really want to hear further on that.

17 As I sit here I think the question is simply, number
18 one, when will we proceed to trial, if we are going to trial
19 and, number two, how to deal with the fact that defendant has
20 not submitted the required pretrial materials, including, I
21 think, probably most substantially any affidavit of witnesses.

22 There has been no jury demand, so it's a bench trial.
23 That means I take direct testimony by declaration, as you know,
24 as you have submitted testimony from your side. How long a
25 trial would you anticipate, Ms. Gutierrez?

1 MS. GUTIERREZ: I don't anticipate the trial lasting
2 more than two days. And if all parties appear, one and a half
3 days.

4 THE COURT: Mr. Kaushik, in case you didn't hear that,
5 Ms. Gutierrez predicts a trial for somewhere between
6 approximately two days. Do you have any disagreement with
7 that?

8 MR. KAUSHIK: No, your Honor, no disagreement on that.

9 THE COURT: Ms. Gutierrez, you have a request as to
10 approximately when we proceed to trial, what month?

11 MS. GUTIERREZ: If your Honor's calendar is available
12 some time in January or February, that would be fine with
13 plaintiffs. I know things are busy, though.

14 THE COURT: My deputy is going to look at the
15 calendar.

16 Ms. Gutierrez requested a date in January or February.
17 We are looking at the calendar now.

18 I have January 11 available, proceeding on January 11,
19 Ms. Gutierrez.

20 MS. GUTIERREZ: Yes. That's fine for the plaintiffs.

21 THE COURT: Mr. Kaushik.

22 MR. KAUSHIK: Your Honor, I may not be back from India
23 by January 11.

24 THE COURT: You have other people in your firm?

25 MR. KAUSHIK: No, your Honor. I'm a solo

1 practitioner.

2 THE COURT: The docket entry indicates that you are
3 Kaushik & Associates, PLLC. Is that inaccurate?

4 MR. KAUSHIK: Yes, your Honor. When I started out,
5 there were a couple of other people, but eventually they left.

6 THE COURT: Why can't you return for a scheduled
7 trial?

8 MR. KAUSHIK: Because, your Honor, I am here for my
9 family reasons, your Honor.

10 THE COURT: When will you return?

11 MR. KAUSHIK: Probably somewhere in the middle of
12 January or toward the end of January. If not, I will
13 definitely give at least one month's notice to the Court and
14 the plaintiffs' attorney.

15 THE COURT: I'm afraid we are out of time,
16 Mr. Kaushik. This case has been pending for over a year and
17 it's simply time to put a trial date down. So I think the
18 question is whether you can continue to represent your clients
19 or not.

20 MR. KAUSHIK: Your Honor, if I may, can we have the
21 date on January 11, and I will definitely inform the honorable
22 court by December 11 that I'll be able to move forward in the
23 case or not because of my presence in India.

24 THE COURT: I will set January 11 as the date. I
25 hereby order Mr. Kaushik to inform the Court by December 11

1 whether he is able to participate in a trial by that date. And
2 if he's not, then he will give notice to his clients that he
3 can no longer represent them and must seek other counsel. If,
4 for example, Mr. Kaushik, you had put in a letter to the Court
5 in advance of this conference indicating that you had a family
6 issue or the like, that you needed to travel and be away, I
7 would have been more understanding of that concern.

8 Let me also ask you, Mr. Kaushik, when we began this
9 proceeding you said that you thought one of your associates
10 would be able to cover this proceeding, didn't you?

11 MR. KAUSHIK: Your Honor. Associate, I meant was per
12 diem attorney.

13 THE COURT: And who is that?

14 MR. KAUSHIK: I called him and he was not able to pick
15 up the phone. Vivek Suri.

16 THE COURT: And where is he?

17 MR. KAUSHIK: He's based in New York, your Honor.

18 THE COURT: Is he at a firm or a solo practitioner?

19 MR. KAUSHIK: He's a solo practitioner, your Honor.

20 THE COURT: And you had requested that he cover this
21 conference?

22 MR. KAUSHIK: Your Honor, I said I called him and left
23 him a voice mail, but I never heard back from him.

24 THE COURT: Why didn't you put in a letter to the
25 Court indicating that you wouldn't be able to have this

1 conference?

2 MR. KAUSHIK: That is my mistake, your Honor, and I
3 completely apologize to your Honor.

4 THE COURT: Mr. Kaushik, you need a solution to the
5 problem here because what you are doing is unacceptable to the
6 Court and, for whatever the reasons, as I said, if you put in a
7 letter and inform the Court of your issues, I'd be in a better
8 position to have sympathy for it than the fact that defense
9 counsel is here and resources are being spent. You simply
10 don't get to decide how and when this case proceeds without
11 communicating with the Court.

12 MR. KAUSHIK: I completely understand, your Honor. I
13 completely understand.

14 THE COURT: I am setting trial for January 11. I
15 expect to hear from you, Mr. Kaushik, by December 11 indicating
16 whether you are prepared to proceed or whether you have
17 communicated with your clients that they need to find new
18 counsel who will be prepared to proceed on January 11.

19 I'm also ordering you, Mr. Kaushik, to purchase a copy
20 of the transcript of today's proceeding and to provide a copy
21 of the transcript to your clients. And I would like
22 confirmation that you have done so by two weeks from today.

23 MR. KAUSHIK: Sure, your Honor. Your Honor, if I may,
24 can I get the court reporter's name and number so that I can
25 request a copy.

1 THE COURT: As soon as I step down from the bench we
2 will give it to you. It will be given to you. I would like a
3 letter filed on ECF two weeks from today confirming that you
4 have sent a copy of the transcript of today's proceeding to
5 your client and that they have received it. We will do that by
6 December 11 as well. I said two weeks, but I'm changing that.
7 So December 11 I'll hear from you regarding the trial date,
8 confirming that you sent a copy of this transcript to your
9 clients and confirming whether you will proceed representing
10 your clients prepared to go to trial on January 11 or whether
11 you've discussed with them their need to find new counsel. Ok?

12 MR. KAUSHIK: Sure, your Honor. Definitely.

13 THE COURT: Ms. Gutierrez.

14 MS. GUTIERREZ: I just wanted to make sure that we
15 covered the issue of whether or not affidavits would be
16 submitted by a certain date and, if not, I would obviously ask
17 the Court to preclude any testimony as now they have had
18 several opportunities to comply with the Court's orders and
19 have not and have not submitted anything to indicate what their
20 testimony will be.

21 THE COURT: Ms. Gutierrez's request was to get
22 resolution of the existing request to preclude your clients or
23 client, I suppose, from testifying because of the failure to
24 abide by pretrial orders regarding filing of affidavits.

25 Mr. Kaushik, against my better judgment I am giving

1 you a final opportunity also by December 11 to file any such
2 direct testimony affidavits or I will, in the absence of doing
3 so, I will grant plaintiffs' request to preclude direct
4 testimony at trial. Ok?

5 MR. KAUSHIK: Yes, your Honor. Your Honor, can I make
6 one request, your Honor?

7 THE COURT: Go ahead.

8 MR. KAUSHIK: There had been talks of potential
9 settlement between the plaintiffs and the defendants. I had
10 been pushing my clients to go for a settlement in the case
11 rather than spending a lot of time with the litigation. If we
12 are able to reach a settlement, will that be ok for the Court?

13 THE COURT: I'm just repeating to Mr. Gutierrez
14 representations that there had been efforts at settlement and
15 there is still some desire to settle. Of course, it seems to
16 me a case that should be settled and resources not spent on the
17 trial. I understand there was a settlement conference in
18 October, is that correct, in front of Judge Netburn, but
19 settlement was not reached? Certainly if settlement was
20 reached, we will not proceed to trial. I will review the
21 settlement as I must, but I'll be very happy if a mutually
22 agreeable and fair and reasonable settlement is reached. But
23 those discussions, in light of all that's occurred in this
24 case, those discussions have to occur with a firm understanding
25 that we will proceed to trial on January 11 in the absence of

1 settlement. All right, Mr. Kaushik?

2 MR. KAUSHIK: Yes, your Honor.

3 THE COURT: Anything further, Mr. Kaushik?

4 MR. KAUSHIK: No, nothing, your Honor. Thank you so
5 much. I really appreciate your generosity, your Honor.

6 THE COURT: Ms. Gutierrez.

7 MS. GUTIERREZ: Nothing further, your Honor.

8 THE COURT: Thank you. We are adjourned. I will step
9 down, but the court reporter will give you contact information.
10 We are adjourned.

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